United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

To be argued by:
David E. Blabey, Esq.

76-7601

United States Court of Appeals

For the Second Circuit

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P/S

WARREN DONAHUE, SANDRA WEISMAN, VALDA BROMWELL, ROY G. VANASCO, JOHN T. STEWART, NICHOLAS A. LONGO, LYNDON LA ROUCHE, THE ROCKLAND COUNTY CONSERVATIVE PARTY, AND THE LABOR PARTY,

Plaintiffs-Appellants,

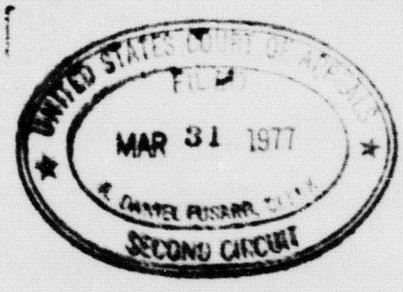
-against-

BOARD OF ELECTIONS OF THE STATE OF NEW YORK, BOARD OF ELECTIONS OF THE CITY OF NEW YORK, SECRETARY OF THE STATE OF NEW YORK, BETTY DOLEN AND HUGH CAREY,

Defendants-Appellees,

On Appeal From the United States District Court
For The Eastern District of New York

BRIEF FOR DEFENDANT-APPELLEE NEW YORK STATE BOARD OF ELECTIONS



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THE LEGAL ISSUE PRESENTED BY THIS APPEAL

Plaintiffs-appellants (hereinafter plaintiffs, seek Appellate review of whether Chief Judge Mishler erred in establishing a standard requiring plaintiffs to present proof of intentional actions on the part of defendant-appellees (hereinafter defendants) in order to state a claim upon which relief could be granted under the Civil Rights Act of 1871.

Defendant-appellee New York State Board of Elections (hereinafter defendant Board) respectfully submits, however, that the real issue before this Court is whether the appeal is moot, for the trial court never applied the challenged standard in dismissing plaintiffs' complaint.

THE LAW

POINT I

THE LEGAL ISSUE RAISED BY PLAINTIFFS' APPEAL IS ACADEMIC FOR DEFENDANT BOARD WAS NOT SUBJECT TO SUIT UNDER THE CIVIL RIGHTS ACT

Plaintiffs have limited their appeal to the specific issue of whether the Trial Court established a proper standard of proof for their causes of action brought pursuant to the civil portions of the Civil Rights Act of 1871 (42 U.S.C. §1983 and §1985)*. This issue, however, does not relate to defendant Board. for as the Trial Court found, defendant Board is not a "person" for the purposes of a Section 1983 action. As Chief Judge Mishler stated in his Memorandum of Decision and Order of December 7, 1976:

> "Extended discussion is not required of the well-settled principle that states, counties, municipalities, or their agencies are not 'persons' answerable to plaintiffs in an action

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* (Plaintiffs' Brief, pp. 4, 11) Before reaching this issue, plaintiffs also argue that even though the election is over, the issue raised by their appeal poses a controversy capable of repetition, and therefore, is not moot. However, as more fully discussed in Point II, infra, the court below held, following an evidentiary hearing, that plaintiffs failed to prove any acts of fraud performed by defendants (84a). Without such proof of wrongful behavior, no issue "capable of repetition yet evading review" was ever established as existing between the parties, and therefore, the holding of Southern Pacific Terminal Company v. I.C.C. 219 U.S. 498 (1911) would not save the appeal from being mooted.

> at law or suit in equity to redress enumerated deprivations, pursuant to the Civil Rights Act of 1871. 42 U.S.C. Section 1983. Aldinger v. Howard, ___ U.S. ___, 96 S.Ct. 2413, 2421 (1976); City of Kenosha v. Bruno, 412 U.S. 507, 512-513, 93 S.Ct. 2222, 2226 (1973); Monroe v. Pape, 365 U.S. 167, 187-191, 81 S.Ct. 473, 484-486 (1961); Brault v. Town of Milton, 527 F.2d 730, 732 (2d Cir.) on rehearing, 527 F.2d 536 (2d Cir., 1975) (en banc)." (63a)

While the Trial Court did determine that it had jurisdiction over defendant Board under 28 U.S.C. §1331(a), for plaintiffs' cause of action for injunctive relief predicated on the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the dismissal of plaintiffs' cause of action under §1331(a) has not been appealed. Thus, the appeal fails to raise any issue between plaintiffs and defendant Board.*

POINT II

THE TRIAL COURT NEVER UTILIZED THE STANDARD WHICH IS THE SUBJECT OF PLAINTIFFS' APPEAL WHEN IT DISMISSED THEIR COMPLAINT FOR FAILURE TO STATE A CAUSE OF ACTION

In his Memorandum of Decision and Order of December 10, 1976, Chief Judge Mishler held that:

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* In support of their claim that the appeal is not moot, plaintiffs also allege that they have a substantial claim for damages. Without conceding that such a claim exists, defendant Board, submits that as an agency within the Executive Department of the State of New York, (McKinney's New York Election Law §468), plaintiffs are barred from seeking damages from it by the Eleventh Amendment to the Constitution. See Edelman v. Jordan, 415 U.S. 651 (1974) Thus, as to defendant Board, a damage claim would not prevent the appeal from being mooted.

> "In sum, the plaintiffs have failed to prove that specific acts of fraud were performed by persons acting under color of state law, or that the irregularities in the voting, if eliminated from the final tally, would have changed the result. Accordingly, the court finds no likelihood that plaintiffs will prevail on the merits." (84a) (emphasis added)

Because of the absence of findings that the defendants played an affirmative part in any fraudulent or illegal acts, or that the outcome of the election would have been different in the absence of fraud, the alleged causes of action under §1983 were properly dismissed.* For "the plain words of the statute impose liability - whether in the form of payment of redressive damages or being placed under an injunction - only for conduct which 'subjects or causes to be subjected' the complainant to a deprivation of a right secured by the Constitution and laws." Rizzo v. Goode, 423 U.S. 362, 370-371 (1976).

In Rizzo, a class action for injunctive relief was brought under 42 U.S.C. §1983 against the Mayor, City Managing Director and Police Commissioner of Philadelphia alleging a pervasive pattern of illegal and unconstitutional police mistreatment of minority citizens. Although the district court failed to find any affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by the defendants

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* 42 U.S.C. §1983 applies to persons who "under color of any statute, ordinance, regulation, custom or usage of any state or territory subjects or causes to be subjected...any citizen... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws..."

showing their authorization or approval of such conduct, it ordered that a review board procedure be implemented to handle citizen complaints. The Third Circuit Court of Appeals affirmed.

The Supreme Court, however, reversed and stated:

> "Here, the District Court found that none of the petitioners had deprived the respondent classes of any rights secured under the Constitution. Under the well-established rule that federal 'judiciary powers may be exercised only on the basis of a Constitutional violation,' ...this case presented no occasion for the District Court to grant equitable relief against petitioners." (Id. at 377) (emphasis added)

As noted, the court below also failed to find any proof that the defendants deprived plaintiffs of any Constitutional rights. This was so even though at the evidentiary hearing, the court permitted plaintiffs to introduce all the testimony and exhibits they had to offer, including purported evidence of negligent actions and acts of omission on the part of defendants that allegedly violated Constitutional rights. However, because of the court's failure to find any acts of fraud committed under color of state law, there was no basis for it to award damages or provide injunctive relief. In addition, the finding effectively precluded the court from reaching the issue of whether plaintiffs' proof was sufficient to establish conduct committed with intent to defraud.

Finally, since the court below held that as a matter of mathematics plaintiffs' proof of election irregularities was insufficient to alter the outcome of the election (83-84a), the interim criteria set forth in the Decision and Order of December 7, 1976 were never reached or applied by Chief Judge Mishler when he dismissed plaintiffs'

cause of action for injunctive relief.* Thus, the issue of whether the court below erred when it required proof of fraudulent intent is doubly moot, insofar as the cause of action for injunctive relief is concerned.

POINT III

IF THE ISSUE RAISED ON APPEAL IS NOT MOOT, DEFENDANT BOARD SUBMITS THAT THE TRIAL JUDGE'S REQUIREMENT THAT PLAINTIFFS PRESENT PROOF OF INTENTIONAL ACTIONS WAS PROPER IN ALL RESPECTS

Should this Court decide that the specific issue raised by plaintiffs' appeal is not moot, defendant Board respectfully submits that the Trial Judge correctly required plaintiffs to present proof of intentional actions in order to state a claim actionable under either §1983 or §1985(3). The court's intent requirement is set forth in its interim decision of December 7th as follows:

> "But before a federal court can responsibly order a new election, the claimants seeking this extraordinary relief must come forward with the most clear and convincing evidence that state officials or persons acting under color of state law, by intentionally depriving qualified voters of the right to vote, altered the outcome of the election. A party contesting a Presidential election carries a heavy burden. Not to put too fine a point on it, this standard implies conduct of a most egregious nature, approximating criminal activity." (69a) (emphasis added)

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* In the absence of proof that unlawful behavior would have changed the outcome of the election, the extraordinary request that the election results be set aside was properly denied. See Lehner v. O'Rourke, 339 F.Supp. 309 (S.D.N.Y. 1971) and Point III (c), infra.

(a) Uneven or Erroneous Application of an Otherwise Valid Statute Constitutes a Denial of Equal Protection and Due Process Only if it Represents Intentional or Purposeful Discrimination.

Plaintiffs alleged that the defendants condoned and permitted election irregularities with the result that unregistered persons were permitted to vote, thereby depriving those voters who were properly registered the equal protection and due process of law guaranteed by the First and Fourteenth Amendments to the United States Constitution.* In Snowdon v. Hughes, 321 U.S. 1 (1943), the Supreme Court addressed a similar claim that official action constituted a denial of the equal protection of the laws secured by the Fourteenth Amendment. The Court rejected the claim and stated:

> "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination." (Id. at 8)

Since Snowden, it is clear that a cause of action based upon the Equal Protection Clause of the Fourteenth Amendment requires proof of intent. See Village of Arlington Heights v. Metropolitan Housing Development Corporation, ___U.S.___, 45 LW 4073 (January 11, 1977). Oyler v. Boles, 368 U.S. 448 (1962) and Powell v. Power, 436 F.2d 84 (2d Cir., 1970).

Further, the recent case of Washington v. Davis, 426 U.S. 229

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* Plaintiffs' Complaint (11-12a)

(1976), indicates that the Supreme Court will require proof of intent to establish causes of action based on other Constitutional provisions. In Washington, a test given to police recruits was challenged as racially discriminatory under the Due Process Clause of the Fifth Amendment. Although the lower courts failed to find any discriminatory purpose on the part of those who established the tests, it was nevertheless held unconstitutional because of its racially disproportionate impact. The Supreme Court, however, reversed and held that:

> "Though the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the Government from invidious discrimination, it does not follow that a law or other official act is unconstitutional solely because it has a racially disproportionate impact regardless of whether it reflects a racially discriminatory purpose." (Id. at 230)

In stressing the importance of finding a purpose to discriminate, the Supreme Court also noted that the rule is the same in other contexts, citing Wright v. Rockefeller, 376 U.S. 52 (1964). In Wright, a New York Congressional apportionment statute was upheld against a claim that district lines had been racially gerrymandered since there was no proof of an invidious discriminatory purpose on the part of the New York Legislature.

Since Washington, the Supreme Court has also required proof of intent to state a cause of action under §1983 for a violation of the Eighth Amendment's prohibition against cruel and unusual punishments. See Estelle v. Gamble, ___U.S.___, 45 LW 4023 (November 30, 1976). Thus, in requiring plaintiffs to provide proof of intentional acts, Chief Judge Mishler followed the standard set for Constitutional causes of action as enunciated in Washington and Estelle.

(b) The Second Circuit Court of Appeals Has Held That Not Every Election Irregularity Will Give Rise to an Equal Protection or Due Process Claim.

In Powell v. Power, supra, this Court addressed the issue of whether administrative infirmities in an election, in the absence of wilful or knowing dilution of ballots by illegal voting, create a remedy in the federal courts. As in the instant case, the plaintiffs in Powell alleged that State officials permitted voting by persons not qualified to vote under State law thereby diluting the votes of qualified voters, but they failed to allege that the dilution was wilful or knowing.

In affirming the district court's denial of relief under §1983, the Court said:

> "In the plaintiffs' view, two federal statutes comprehensively protect their ballots against dilution by illegal voting, whether or not the dilution was wilful or knowing. It is appropriate to note at the outset that the plaintiffs do not claim any discrimination because of race. Thus, they face a considerable burden or persuasion in asserting so sweeping and novel a conception, one apparently never before asserted, as far as reported cases reveal. Were we to embrace plaintiffs' theory, this court would henceforth be thrust into the details of virtually every election, tinkering with the state's election machinery, reviewing petitions, registration cards, vote tallies, and certificates of election for all manner of error and insufficiency under state and federal law." (Id at 86)

The Powell holding is directly on point to the instant case. Its rationale has also been adopted by the Eighth Circuit in Pettengill v. Putnam County R-1 School District, Unionville, Missouri, 472 F 2d 121 (1973), the Seventh Circuit in Bohus v. Board of Election Commissioners, 447 F.2d 821 (7th Cir., 1971) and by a district court in Means v. Wilson, 383 F.Supp. 378 (D.SD. 1974).

(c) The Trial Court's Refusal to Invalidate the Election, in the Absence of Proof of Intentional Actions, Was Within Its Discretion as a Court of Equity

The traditional standard for reviewing a denial of equitable relief is whether a district court abused its discretion in denying the relief requested. Brotherhood of Locomotive Engineers v. M-K-T-R Co., 363 U.S. 528, 535 (1960); Williams v. Rhodes, 393 U.S. 23, 65 (1968).

In the court below, plaintiffs requested equitable relief that was truly extraordinary in nature - the setting aside of the election of New York's forty-one Presidential Electors. Such an action would have created a serious Constitutional issue as to the proper procedure to be followed under the Twelfth Amendment and might also have thrown the election of the new President into the House of Representatives.

In addition, setting aside the election would have had an even greated chaotic and disruptive effect on the electoral process if the court had both invalidated the results and ordered a new election. This is because the State's electoral votes would have provided the margin of victory for either of the two major party Presidential candidates, and thus, the State's voters would have had a role in the selection of the new President far exceeding in importance that consistent with the concept of "one man, one vote."

Accordingly, the trial court exercised great discretion when it balanced plaintiffs' request for injunctive relief with the effects on the electoral process of granting such relief and decided to require proof of intentional actions on the part of

defendants as a precondition to issuing any order overturning the election.

(d) In Order to Prove a Cause of Action Under 42 U.S.C. §1985(3), Intentional or Purposeful Discrimination Must Be Established.

Plaintiffs also alleged a cause of action under 42 U.S.C. §1985(3). That section creates a cause of action where "two or more persons...conspire...for the purpose of depriving...any person or class of persons of the equal protection of the laws..." However, it is well-settled that in order to prove a cause of action under §1985(3), it is necessary to establish intentional or purposeful discrimination between classes or individuals. See Griffin v. Breckenridge, 403 U.S. 88 (1971); and Robinson v. McCorkle, 462 F.2d 111 (3d Cir., 1972). Thus, the court below correctly required proof of intent to establish a conspiracy cause of action under §1985(3).

CONCLUSION

THE STANDARD CHALLENGED ON APPEAL WAS NEVER APPLIED BY THE TRIAL COURT, AND THEREFORE, THE APPEAL SHOULD BE DISMISSED AS MOOT.

Dated: March 30, 1977

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing Brief of Defendant-Appellee New York State Board of Elections, were mailed, postage prepaid on March 30th, 1977 to the following parties:

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